United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

296

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FILED AUG 25 1969

Nathan J. Paulson
CLERK

No. 22,507

In re Estate of Jacob S. Wall

SOL M. ALPHER and DAVID M. GRUBER,
Appellants,

v.

NATHANIEL A. PRESTON,
Adm., C.T.A., of the Estate of Jacob S. Wall,
also known as Jack Wall, Deceased.
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES

Are creditors of the insolvent estate of a deceased husband precluded from presenting evidence that funds are in fact an asset of the insolvent estate merely because the funds were held by the insolvent decedent as tenants by the entireties with his estranged wife.

The pending case was not previously before this Court under the same or similar title.

REFERENCES TO RULINGS

NONE

STATEMENT OF THE CASE

This appeal is from an Order of the District Court dismissing an Order to Show Cause issued against Nathaniel A. Preston, Adm., C.T.A., of the Estate of Jacob S. Wall, deceased. The estate is insolvent, with claims totaling approximately $42,000.00; assets total approximately $1,900.00. Appellants are two of the creditors of the said estate, having duly filed their respective claims. (R. 31). (App. 29, 30).

Appellants petitioned the Court below for an Order to Show Cause why the Administrator should not be required to proceed to recover a certain asset of the Estate from the widow of the decedent. (R. 32) (App. 35 *et seq.*). After oral argument on the petition and the answer thereto, the Court dismissed the Order to Show Cause. (R. 36) (App. 42). This appeal followed. (R. 37) (App. 43).

The asset which appellants sought to require the Administrator to recover consists of monies on deposit with Perpetual Building Association, believed to be in excess of $200,000.00, in an account in the names of decedent and his wife as tenants by the entireties. These funds in turn represented the net proceeds of a sale of real estate which had been titled in decedent and wife as tenants by the entireties.

Appellants contended that at least one-half of said funds, if not the whole thereof, was and remained the property of the decedent and was an asset of his estate. (R. 32) (App. 35).

The petition was resisted by the Administrator on the ground that the monies belonged to the surviving spouse, as the survivor of a tenancy by the entirety; that for this reason, any attempt by the Administrator to recover the asset would be a futile gesture. (R. 34) (App. 25 *et seq.*, 38). It should be noted that the Administrator is a brother of the surviving spouse. (R. 9) (App. 18).

At the hearing on the petition, appellants informed the Court that at an appropriate evidentiary hearing they would produce evidence which would show the following facts:

1. Decedent had been estranged from his wife for about 14 years.

2. Decedent, filing a separate tax return for 1963, reported as income the entire gain resulting from the sale of the property involved, the proceeds of which sale were deposited in the joint account.

3. Decedent, filing a separate tax return for 1964, accounted for 100% of the interest income from the deposit involved, with the full knowledge of the wife's tax accountant.

4. Decedent and his wife did not regard the Perpetual account to be in a single and indivisible ownership.

ARGUMENT

It should be noted that the Court below was not being asked to rule on the ultimate issue of the rights of creditors with respect to the jointly owned assets, but only on the threshold issue of the right of inquiry into the true nature of the joint ownership. The issue before the Court was this: Does the existence of the deposit in the form of a tenancy by the entirety preclude inquiry into its nature at the demand of creditors of an insolvent deceased tenant.

Inherent in its ruling dismissing the Rule to Show Cause was the holding by the Court that a tenancy by the entirety is absolutely inviolable, regardless of the fact that this operates to defraud decedent's creditors.

But this Court has already said that this type of tenancy is to be scrutinized with care to prevent fraud and injustice to creditors.

In *Imirie v. Imirie*, 100 U.S.App.D.C. 371, 246 F.2d 652 (1957), examination of the essence of a joint account of decedent and his wife "with right of survivorship" was approved. The husband had converted three of his checking accounts to joint ownership with his wife, and had opened a new account in joint names. After her husband's death, the wife withdrew all of the funds. Her husband's executors contested her right to do so. This Court said:

> "We need add only that the dangers inherent in situations of this sort are indeed serious. If a wife can take by survivorship the funds in the commercial checking accounts of a business conducted by her husband, in disregard of the claims of creditors or other interested persons, a ready means of producing fraud and injustice has been created. If such a result is ever to be reached, it should only be upon clear evidence of the husband's donative intent and after careful judicial scrutiny of the impact of the transaction."

The Court spoke of the necessity of "careful judicial scrutiny of the impact of the transaction" by which the survivorship account was created. It is precisely the type of fraud and injustice on creditors perpetrated here that appellants sought to have the Court below examine in the instant case.

In the instant case, husband and wife had been estranged at least 14 years, and the rationale of *Tendrich*, infra, is just as appropriate.

Partition of real property held by husband and wife as tenants by the entireties has been approved by this Court where the parties were separated by a limited divorce.

> "We think we should recognize the obvious fact that persons one of whom has divorced the other for cruelty, although the divorce is only a limited one, are not one person and that refusal to partition their property may inflict an undeserved benefit on the plaintiff, confer an undeserved benefit on the defendant, and serve no useful purpose." *Tendrich v. Tendrich*, 90 U.S.App.D.C. 61, 193 F.2d 368 (1951).

Harrington v. Emmerman, 88 U.S.App.D.C. 23, 186 F.2d 757 (1950), concerns a joint savings account (survivorship) between two women and the contest for the money by the committee of one of them. This Court noted, in its recitation of the facts, that the creator of the account continued, after she changed it to a joint one, to treat it as her own. She reported the income therefrom as part of her own income for tax purposes. In the instant case, appellants proffered evidence that the decedent likewise treated the account as his own, including the reporting of income for tax purposes, with the knowledge of and without protest from the wife.

It is worthy of note that Imirie (supra) was very recently relied upon by the District of Columbia Court of Appeals in its decision of a joint account case, *Prather v. Hill*, No. 4318, decided February 28, 1969, ___A.2d___. In discussing factual differences between the two cases, that Court said:

> "In Imirie, the court acknowledged that there was evidence that decedent husband had intended that the surviving wife have a present right to use the funds in the joint accounts he had established but the court held that there was no evidence of his intent that she have the balance by right of survivorship. The court gave considerable weight to the fact that the accounts were business accounts of the husband. The court pointed out that a businessman could avoid his creditors by the device of holding his assets jointly

> with his wife and that a provision for survivorship of a bank account should be carefully scrutinized to be certain that it is not contrary to public policy."

Recent decisions of high courts of Illinois, Ohio, and Nebraska show a unanimity with this Court on the issue here presented.

Estate of Roth v. Roth, 96 Ill.App.2d 292, 238 N.E.2d 607 (1968), concerned litigation between the estate of a decedent and his son over the right to proceeds of a joint account. In finding the asset to belong to the son, the Court said:

> "Although joint ownership is set up in conformity with statutory provisions, a court of equity is not thereby foreclosed from looking behind the forms of transactions and determining questions of the real and beneficial interest between the parties."

Fecteau v. Cleveland Trust Co., 171 Ohio St. 121, 167 N.E.2d 890 (1960), a suit between an estate of a joint owner and the survivor, upheld the estate's claim, and includes the following syllabus by the Court:

> "The fact that a bank account is carried in the names of two persons jointly with right of survivorship is not always conclusive as to the ownership of the account, and, where a controversy arises as to the ownership of such account, evidence is admissible in a proper case to show the true situation."

In *Eden v. Eden*, 182 Neb. 768, 157 N.W.2d 543 (1968), the Court had before it the claim of an administrator against decedent's son for the proceeds of a joint account of decedent and his son. The Court said, in holding for the administrator:

> "Parol evidence is admissible in an action of this nature to establish an oral trust. *Minahan v. Waldo*,

> 161 Neb. 78, 71 N.W.2d 723. There is no attempt in this case to vary the terms or the conditions of the deposit contract, but rather parol evidence is being used here in an action by strangers to the contract seeking to establish a trust agreement with reference to the disposition of the funds and inconsistent with the terms of the joint tenancy deposit."

CONCLUSION

The funds of the insolvent decedent were on deposit in the form of a tenancy by the entireties with his estranged wife. The decedent and his estranged wife treated them as his separate funds. The estranged wife's brother, the administrator of the insolvent decedent's estate, refused to seek the fund. The District Court refused any inquiry into the true nature of the fund because of its form. This ruling permitted the estranged wife and her brother to defeat the claims of creditors of the insolvent decedent. The ruling should be reversed so as to permit, at least, an inquiry into the true nature of the fund.

The case should be remanded to the District Court with instructions to hold an evidentiary hearing.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,507

IN RE ESTATE OF JACOB S. WALL,
SOL M. ALPHER and DAVID M. GRUBER,
Appellants,

v.

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the Estate of Jacob S. Wall, also known as
Jack Wall, Deceased,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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IN THE
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NO. 22507

SOL M. ALPHER *and*

DAVID M. GRUBER,

Appellants,

v.

NATHANIEL A. PRESTON, ADM. C.T.A.,
OF THE ESTATE OF JACOB S. WALL,
ALSO KNOWN AS JACK WALL, DECEASED.

Appellee.

Appeal from the United States District Court
for the District of Columbia

STATEMENT OF THE CASE

This appeal is taken by the Appellants as a result of the dismissal by the District Court of an Order to Show Cause, which Order was initiated by the Appellants.

Nathaniel A. Preston is the duly qualified and acting

Administrator of the Estate of the decedent, Jacob S. Wall, Administration No. 116,909 in the District Court. The estate from its inception, as an estate, has been beset with many difficulties which the Administrator and counsel have and are resolving with the assistance of the local Courts and the Office of the Register of Wills. Among these problems is the insolvency of the estate. The Administrator welcomes whatever assistance and constructive advice creditors and beneficiaries of the estate can contribute toward reducing and possibly eliminating the estate's insolvency. To this end, the Administrator must use his good judgment and be guided by applicable law and not cause further loss to the estate by expending funds for futile and frivilous causes.

On November 2, 1967 one of the Appellants (Alpher) filed a Petition for Order to Show Cause why the Administrator (Appellee herein) should not be required to proceed to recover from Frances Wall (decedent's widow) certain funds in her possession by virtue of having been *fully* acquired by her free from any interest or claim by the personal representative of decedent (R. 24, 25). The Administrator answered (R. 26) and the District Court dismissed the Order to Show Cause. Subsequently the same creditor joined with another creditor (Gruber) and filed on August 14, 1968 a similar petition (R. 32). The

District Court on August 15, 1968 issued an Order to Show Cause (R. 33) to which the Administrator responded asking that the Order be dismissed (R. 34). On October 1, 1968 after full hearing and argument the District Court properly and correctly dismissed the Order to Show Cause (R. 36).

The Appellants were asking the District Court to direct the personal representative of the decedent to undertake a legal crusade to have the long established law applicable to tenancy by the entirety amended. Seventy-three years ago in *Alsop v. Fedarwisch*, 1896, 9 App. D. C. 408, at 416, this Court stated, referring to joint tenancy and tenancy by the entireties,

> * * * *It is for the legislature power to abolish it, not for the Courts. (emphasis added)*

The material applicable substantive facts in this case are:

The asset to which Appellants make reference commenced many years ago as a tract or parcel of unimproved ground in the District of Columbia owned and titled in the names of the decedent and his widow, who were lawfully married, as *tenants by the entireties*. The property was about to be foreclosed upon (Exhibit A attached to Answer to Order to Show Cause, R. 26 and 34). The decedent, who was then alive, and his widow conveyed the property for valuable consideration depositing the proceeds

into Perpetual Building Association as *tenants by the entireties* (R. 26 and R. 34 - Exhibit A attached thereto). This exhibit recited therein

> . . . The sale herein was <u>not</u> motivated by intent or agreement on my part to terminate or partition the estate held as tenancy by the entireties. Its purpose was to avert imminent foreclosure.
>
> * * * * *
>
> . . . the entire net proceeds of the sale be delivered to the Perpetual Building Association to be placed on deposit with it in the name of "Jacob Wall and Frances P. Wall, tenants by the entireties" . . .
> (emphasis added)

Subsequently the fund was so deposited and remained, less and excepting such part or portion as was withdrawn.

At no time was any part of this fund part of the decedent's estate. It was, until the death of the decedent, *per tout et non per my* and thus *the whole remains and belongs absolutely to the survivor.*

Appellants allege that the estrangement of decedent and his widow dissolved or terminated the tenancy by the entireties —— such is not the law. The taxes on the sale of the real property were paid from the fund. The decedent and his widow treated the fund resulting from the sale and designated it as *tenants by the entireties.* The relationship between the Appellee and the decedent's widow in no way, manner or form

affects the law pertaining to the claim of a personal representative against the survivor of a tenancy by the entireties since property fully acquired by such survivor because of the death of her spouse becomes her absolutely. Appellee's refusal to invoke the aid of the District Court in an effort to obtain the fund in the possession of the decedent's widow is proper. Any such action would be without merit; an unnecessary expense to the estate; an improvident act and violation of the fiduciary obligation to the estate. The law does not require the performance of a useless act. *Burke v. Thomas J. Fisher Co.*, 1953, 127 F. Supp. 1, aff'd 1955 in 95 U. S. App. D. C. 85, 219 F.2d 757. The Appellee (Administrator) having demanded and requested (R. 26) the widow for delivery of the fund to him and the widow having refused, any further action would be useless, considering the applicable law and the expense which the estate cannot afford, especially when there are insufficient facts to upset any such tenancy.

A R G U M E N T

From the onset it must be noted that the Appellants acknowledge that the fund involved in this case was held by the decedent and his widow as *tenants by the entireties*, having been derived by the decedent and his widow from the sale of real property which was likewise held by them as *tenants by the entireties*. At all times material herein the fund was always as tenants by the entireties until the decedent died when the widow acquired it absolutely in her own right free of any claim or right of the decedent.

The ownership of the real property as tenants by the entireties. Many years ago the decedent and his widow acquired certain real property in the District of Columbia as tenants by the entireties. There is no question that such tenancies exist in the District of Columbia and are absolutely valid, *American Wholesale Corporation v. Aronstein*, 1926, 56 App. D. C./126, 10 F 2d 991. Prior to the death of decedent, the real property was sold by the decedent and his widow and the proceeds deposited into a savings account with the Perpetual Building Association (R. 26 and 34 - Exhibit A).

The ownership of the fund (savings account) as tenants by the entireties. If no expression had been made by the decedent and his widow the fund (savings account) would nevertheless be and remain as tenants by the entireties. As stated in *Held v. McNett*, 1959, 154 A.2d 349 (D. C. Mun. App.) at 350,

> *It has always been understood that when real property is owned by husband and wife as an estate by the entireties, such is a single, indivisible ownership, not subject to execution on a claim against one of them. And it has always been the law in this jurisdiction that husband and wife may maintain the same type of estate or ownership in personal property.* (emphasis added)

In *Tendrich v. Tendrich*, 1951, 90 U. S. App. D. C. 61, 62 this Court stated:

> This court has long held that when property is conveyed to spouses jointly they own it "by entireties" and that it cannot be partitioned.

The ownership of the savings account in this case is clearly stated and known to have been as tenants by the entireties (R. 26 and 34 - Exhibit A attached). Tenancy by the entireties is well established in the common law and in the District of Columbia, *Alsop v. Fedarwisch, supra; Flaherty v. Columbus*, 1914, 41 App. D. C. 525; *Fairclaw v. Forrest*, 1942, 76 U. S. App. D. C. 197, 130 F.2d 829; *Coleman v. Jackson*, 1960, 109 U. S. App. D. C. 242, 286 F.2d 98. In *Coleman v. Jackson, supra*, 246, this

Court stated:

> What the parties intended in this case is clear if we accept the words of the conveyance as representing the intention of the parties. This must necessarily be done where, as here, no contrary evidence of intention exists. The words used, "tenants by the entirety," mean in law that the parties wanted the property to be inalienable by either during their joint lives, and on the death of one they wished the survivor to take all . . . . . . Survivorship, the salient feature of joint tenancy, is also perhaps the most important feature of tenancy by the entireties; the other major attribute of the latter estate, inalienability, is in part only a means to protect the right of the survivor to take.

It is interesting to note in *Fairclaw v. Forrest, supra*, 201, wherein this Court stated, referring to tenancy by the entireties:

> . . . It is a convenient mode of protecting a surviving spouse from the inconvenient administration of the decedent's estate and from the other's improvident debts. . . . *the rights of each spouse are regarded as equal to the other's and superior to the rights of persons who claim through the other spouse.* Each has the right to receive the property at the death of the other clear of the latter's attempt to encumber it or subjection to payment of his obligations. . . . It is one of protection *against the creditors of the first decedent spouse.*
> *(emphasis added)*

Estates by the entireties were not absolished by the married woman's act, *Alsop v. Fedarwisch, supra*, which further stated:

> That joint tenancy exists in the District of Columbia, however much it may be disfavored, and however greatly it may often controvene the intentions of the parties to the instrument creating it,

> cannot now, of course, be reasonably questioned for a moment. It is for the legislative power to abolish it, not for the Courts.
>
> . . . But the deed is unambiguous in its terms. It needs no extraneous circumstances to show its purpose and intent. There is nothing to show it was executed under a misapprehension of its contents.

It is clear that the decedent and his widow clearly intended the fund to be by the entireties and there is nothing ambiguous about such establishment. There is no possible way that the personal representative can by legal means obtain title and/or possession to the property now held by the widow as a result of the death of decedent. Appellants are seeking resort to a fund against an estate which from its nature is not subject to such process, *American Wholesale Corporation v. Aronstein, supra.*

The case of *Imirie v. Imirie*, 1957, 100 U. S. App. D. C. 371, 246 F.2d 652, is distinguishable and inapplicable to the case at bar. In *Imirie, supra,* it was a clear case of the decedent converting commercial bank accounts relating to and in effect an asset of his business to a joint account or accounts. In the case at bar the 'asset' was never the sole asset of the decedent, at all times and by whatever form it existed, it was by the entireties, *American Wholesale Corporation v. Aronstein, supra.* Jacob Wall, while alive was not entitled to the fee

or the usufruct of the property held by him and his wife as tenants by the entireties, and as stated in *American Wholesale Corporation v. Aronstein, supra,*

> A judgment against the husband is not a lien on the land, nor can his interest be sold under an execution.

In *Imirie, supra,* the decedent's creditors lost their inchoate interest. In the case at bar the Appellants and other creditors of the decedent never had nor relied upon any such inchoate interest in the personalty and realty of the decedent which was held by him and his widow as tenants by the entireties. In the case at bar it is not a situation of a 'joint and survivorship bank account - a concept without a name' as cited in *Imirie, supra,* but rather a savings account as tenants by the entireties with a name and established attributes. To apply the result in *Imirie, surpa,* to the case at bar would in effect result in judicial leglislation terminating all tenancies by the entireties.

In *Tendrich v. Tendrich, surpa,* there existed a limited divorce and thus *a judicial recognition* of the estrangement of the parties. To state that estrangement of husband and wife, where there has been no limited or absolute divorce decree, terminates a tenancy by the entireties, would require inquiry by every attorney examining and passing upon real estate titles

to determine social problems such as to what degree are the parties cohabitating, the degree of the parties love and affection for each other, possibilities of reconcilliation, etc. Such a situation would change a tenancy by the entireties from day to day, moment to moment, resulting in chaos. Cases cited by Appellants pertain to 'joint tenancy' in all of which the Courts hold that where 'joint ownership' is clear they will uphold such ownership as joint tenants with rights of survivorship. *Corpus Juris Secundum*, 41 C. J. S., Husband and Wife, Section 34, generally states that the surviving spouse is entitled to the whole, and at page 461, that the existence of the estate of tenancy by the entireties is not dependent on the good conduct of the respective tenants and is not destroyed by the bad conduct of either.

To hold, if one spouse reported the interest for income tax purposes as extinguishing a tenancy by the entireties, as Appellants allege, would likewise cause great chaos and would permit one spouse to defeat a tenancy by the entireties at the expense and loss to the innocent spouse. This is tantamount to one spouse in such tenancy attempting to encumber such tenancy without the other spouse joining in such encumbrance. This has never been permitted in a tenancy by the entireties. There has been no showing, nor can the Appellants

produce any evidence that the decedent was insolvent when he and his widow first acquired the real property which was subsequently changed into personalty and expressly labeled and titled as tenants by the entireties. In *American Wholesale Corporation v. Aronstein, supra:*

> At the time when the original conveyance was made to Aronstein and his wife, the former was solvent, and moreover the claims of the appellants against him were not then in existence. Accordingly the appellants cannot attack that conveyance. As to the conveyance subsequently made by Aronstein to his wife, the estate was held by them as tenants by the entireties, and the appellants were not entitled to subject the separate interest of Aronstein to the payment of their claims. . .
>
> Under the doctrine of estates by the entireties, neither husband nor wife may convey any interest in the estate to a stranger without the consent of the other, nor can either enforce a partition thereof without the other's consent.
>
> * * * * *
>
> . . . we conclude that no relief can be afforded to the appellants in this case, since in effect they are seeking to enforce execution for the collection of their judgments against an estate which from its nature is not subject to such a process.

Every indication is that the decedent and his widow treated and regarded the savings account as a single and indivisible account as tenants by the entireties. This is further confirmed by decedent's probated will (R. 1). Under

the circumstances the tenancy by the entireties is inviolable. It may defeat the creditors, one of whom is this Appellee as well as the Appellants, but there appears to be no fraud as the Appellants allege.

There is no question that the decedent was insolvent prior to his death. Appellants and others similarly situated were aware of decedent's interest in the tenancy by the entireties herein involved. No attempt was made in decedent's lifetime to attack such tenancy and its assets. Apparently the nominated executors in decedent's will were aware of decedent's insolvency for they renounced their nominations (R. 4, 5 and 6). How then can a decedent insolvent in life become solvent after death? Only by the mutual consent of the widow and the decedent, and as to tenancies by the entireties, the Administrator does not succeed as a co-tenant with the widow. Without the consent of the widow there is no way this or any Administrator can reach property of a tenancy by the entireties. The law does not require the Administrator to do and perform a useless and especially a frivilous act, *Abdallah v. Abdallah*, 1966, 359 F.2d 170 (3rd Cir.); *Burke v. Thomas J. Fisher & Co., supra*.

CONCLUSION

The funds of a decedent and his wife, derived from a sale of real property held as tenants by the entireties, which fund is also held as tenants by the entireties with all the attributes of such tenancy and treated as such by the parties, upon the death of the husband becomes the sole property of the surviving widow, free from any and all claims by decedent's Administrator and creditors, and this is such although the estate of the decedent husband is insolvent.

The District Court took the matter under advisement after a full and complete hearing and properly dismissed the Order to Show Cause why the Administrator should not attempt to obtain such fund in the surviving spouses possession, for the benefit of the estate. There was not a showing, nor can there be a showing that the surviving spouse and/or the Administrator practiced fraud upon the estate and its creditors.

The District Court properly acted upon this case. The case should be affirmed.

Respectfully submitted,

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